Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 78-473

MICHAEL RAY STANDARD - - - Petitioner

versus

HENRY E. COWAN, Superintendent - Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT F. STEPHENS
Attorney General

PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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IN THE

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No. _____

MICHAEL RAY STANDARD - - - *Petitioner*

v.

HENRY E. COWAN, Superintendent - *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the District Court in denying the petitioner habeas corpus relief as reported in *Standard* v. *Cowan,* Civil Action No. 77-3574, entered on July 3, 1978, is correctly set out in petitioner's Appendix at page 30.

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of 28 USC § 1254(1). The Petition for Writ of Certiorari is predicated upon the following grounds: (1) Whether petitioner's sentence of life without the possibility of parole for the

offense of rape constitutes cruel and unusual punishment, and (2) Whether a statement given by the petitioner to the police was obtained in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The respondent respectfully submits that neither of the foregoing contentions constitute a substantial federal question nor do they present any unique question which would require this Court to exercise its certorari jurisdiction. *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969); Supreme Court Rule 19.

The petitioner maintains that his sentence of life without possibility of parole upon having been convicted for the offense of rape, pursuant to KRS 435.090,[1] constitutes cruel and unusual punishment because *it was the most severe punishment possible in the Commonwealth of Kentucky at the time of his conviction.* The foregoing contention is based upon the fact that at the time this offense occurred the death penalty for willful murder in Kentucky had been declared unconstitutional. *Williams* v. *Kentucky,* 408 U. S. 938 (1972); Cf. *Furman* v. *Georgia,* 408 U. S. 429 (1972). The death penalty of course had been the most extreme penalty enforced in Kentucky and that penalty was imposed only for the offense of intentional murder. Thus, after the decision in *Furman* v. *Georgia, supra,* was rendered those persons in Kentucky who had received the death penalty had their sentences commuted to life imprisonment, with the possibility of parole. *Caine* v. *Commonwealth,* Ky., 491 S. W. 2d 824, 832 (1973). Therefore, the severest penalty remaining in Kentucky *at that time* was that of life without the possibility of parole for the offense of rape, as meted out to the petitioner in the instant case, but this was due solely to happenstance.[2]

Petitioner concludes that such a penalty for the offense of rape, since it was more severe than the constitutionally permissible penalties for intentional homicide is unconstitutional under *Coker* v. *Georgia,* 433 U. S. 584 (1977), wherein this Court stated:

> "It is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim."

However, the respondent respectfully submits that the aforementioned language provides no support for the petitioner's argument. The quoted language in *Coker* is taken out of context and the petitioner blindly ignores the circumstances of that case. In Coker this Court simply held that *the penalty of death for rape* in the state of Georgia was grossly disproportionate and excessive punishment for that offense and therefore constituted cruel and unusual punishment. Here,

[1]This statute has since been repealed and replaced under the newly adopted Kentucky Penal Code. See KRS 510.040, and said offense no longer carries a penalty of life without possibility of parole.

[2]The 1974 session of the Kentucky General Assembly (which meets only once every two years) enacted a revised death penalty for intentional homicide, although this revised penalty too was subsequently found to be unconstitutional three years later. *Boyd* v. *Commonwealth,* Ky., 550 S. W. 2d 507 (1977). This statute has again been amended to comply with Constitutional standards.

the penalty given to the petitioner was not death for the offense of rape, but life without benefit or possibility of parole. The penalty of life without benefit of parole has been approved by this Court recently in *Schick* v. *Reed,* 419 U. S. 256 (1974). A similar attack made upon the penalty of life without the possibility of parole was recently rejected by the lower court in *Moore* v. *Cowan,* 560 F. 2d 1298 (6th Cir. 1977), cert. denied March 20, 1978.

From the foregoing authorities it is perfectly clear that the penalty of life without possibility of parole for the offense of rape presents no constitutional infirmity. Cf. *Schick* v. *Reed, supra.* Moreover, *Coker* v. *Georgia, supra,* the very underpinning of the petitioner's argument is clearly not applicable at all to the instant case. Accordingly, it is the position of the respondent that this contention fails to present a substantial federal question for the consideration of this Court. Thus, review by certiorari should be denied.

Respondent's second contention is equally without merit and does not provide a jurisdictional basis for review by writ of certiorari. Respondent maintains that a statement used against him at trial was obtained in violation of various federal constitutional rights. Detective Martin of the Louisville Police Department gave the following testimony at trial as to the statement made to him by the petitioner:

> "Well, en route to police headquarters a general conversation was being carried on when Mr. Standard's exact words were, *'Say, can I ask you a question?'* And I answered him, 'Yes go ahead.'

> And he stated, *'Have you caught the white man ski mask rapist yet?'* I said, 'No, we haven't.' I said, 'He hasn't struck for awhile but we'll catch him.' And his words were, *"Well, I'll bet he's scared shitless since you've caught me.' "* (Transcript of Evidence, hereinafter TE, 127.) (Emphasis ours.)

In addition, Detective Martin testified that this statement was made during general conversation and not in response to any question by police officers in the car. (TE, 123, 127-129, 132, 133.) Respondent vigorously maintains that the above quoted statement was elicited by "trickery" and therefore should be condemned in light of *Brewer* v. *Williams,* 430 U. S. 387 (1977) and *Massiah* v. *United States,* 377 U. S. 201 (1964).

However, this contention is rendered impotent because the statement in question was volunteered by the petitioner during the course of a general conversation with the authorities and was not elicited by the police during the course of interrogation or otherwise. Therefore, this case is distinguishable from *Brewer* v. *Williams, supra,* and *Massiah* v. *United States, supra;* Also see *Kirby* v. *Illinois,* 406 U. S. 682 (1972). Secondly, assuming *arguendo* that the statement in issue was given in violation of constitutional rights under the Fifth and Sixth Amendments, it is obvious that under the Fifth and Sixth Amendments, it is obvious that under the facts of this case that statement is rendered completely harmless and did not adversely effect petitioner's rights to a fair trial. *Chapman* v. *California,*

386 U. S. 18 (1967); *Harrington* v. *California,* 395 U. S. 250 (1969).

Accordingly, this issue too does not merit the exercise of this Court's discretionary power by way of petition for writ of certiorari. *Department of Mental Hygiene* v. *Kirchner,* 380 U. S. 194 (1965); *Maryland and Virginia Eldership of Churches of God* v. *Church of God of Sharpsburg, Inc.,* 396 U. S. 367 (1970).

QUESTIONS PRESENTED

I.

Whether the Penalty of Life Without the Possibility of Parole for the Offense of Rape, As Meted Out to the Petitioner, Constitutes Cruel and Unusual Punishment?

II.

Whether the Statement Made by the Petitioner to the Police Was Obtained in Violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's Petition for Writ of Habeas Corpus was filed pursuant to 28 USC § 2254 and he claims relief under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On September 25, 1974 in the Jefferson Circuit Court, a jury found the petitioner, Michael Ray Standard, guilty of burglary, rape, indecent and immoral practices, sodomy, and armed robbery and fixed his punishment at confinement in the penitentiary for these convictions as follows: ten years for burglary; life without parole for rape; five years for indecent and immoral practices; five years for sodomy; and life for armed robbery. (TE, 384, 385.) His conviction was affirmed by the Kentucky Court of Appeals on September 19, 1975. The facts which give rise to his conviction are as follows:

On the evening of November 16, 1973 at 25 minutes to 9:00 p.m., the prosecutrix, Janet Junot, left the Crescent Hill Library in Louisville, Kentucky, and went to her car in the library parking lot. (TE, 32, 33.) She got into the car and as she turned to lock the door, petitioner opened the door, jumped into the driver's seat, and pushed Miss Junot over onto the passenger's side. (TE, 33.)

He put his hand over her mouth and said, "Don't do anything, I have a gun." (TE, 33.) As he drove her car out of the parking lot some people came out of the library and Standard threatened her violently not to do anything or he would shoot her. (TE, 34.)

He then proceeded to drive her to her apartment at the corner of Hite Avenue and Brownsboro Road in Louisville, Kentucky. (TE, 35.) As they were driving to the apartment, Standard asked her how old she was,

was she married, if she had a roommate, where she lived, if there were many lights around the apartment, and if she had a dog. (TE, 35.)

When they arrived at the apartment, Standard drove the car to a small parking lot in back. (TE, 36.) The back entrance to the apartment building was locked so they walked around to the front entrance. Standard told her, "Okay we're going to go around the front of the building and don't you try anything." (TE, 36.) He then pushed her in front of him and as they walked up the stairs Miss Junot could hear some of her neighbors talking in their apartments. Standard again threatened: "Don't you try anything or I'll shoot you." (TE, 36.)

As Standard was opening the apartment door, a dog belonging to the neighbor directly across the hall started barking (TE, 37); Miss Junot looked at Standard and he turned her head away from him and said, "Have you ever seen me before?" She said, "No." And he said, "Do you know who I am?" She stated, "No." (TE, 37.) Standard opened her door and told Miss Junot to remove her clothes and then pushed her into the bedroom and down on the bed and started pulling her clothes off. (TE, 37.) As he was taking off his clothes Janet noticed a pistol sticking out of his right hand pocket. (TE, 37.)

After taking his clothes off, petitioner got on the bed and forced Janet to perform fellatio upon him. (TE, 38.) However, his lust not having been satisfied, he pushed Janet down on her back and raped her. (TE, 38.) He subsequently sodomized Janet. (TE,

38.) When she screamed from pain, he hit her on the side of the face and put a pillow over her head. (TE, 38.)

When he finally completed these outrages, he dressed, walked through the apartment, looking in closets and other rooms and out the window to see if anyone was outside. (TE, 39.) He told her he was going to step out in the hall for a minute and for her not to make a move and left, apparently using her car to make his getaway. (TE, 40, 54.) Miss Junot walked into the living room, locked the door, and called the police.

She positively identified Standard as the man who had committed the crimes against her. (TE, 40, 41, 64.) Her car was found abandoned and although it was checked for fingerprints, none were found. The evidence technician who investigated the car stated that the car had been wiped by a cloth or material. (TE, 164, 165.) Standard was arrested approximately three months later.

ARGUMENT

I.

The Penalty of Life Without the Possibility of Parole for the Offense of Rape, as Meted Out to the Petitioner, Does Not Constitute Cruel and Unusual Punishment.

As previously noted in the Jurisdictional Statement set out in this Response, the petitioner's attack upon the constitutional validity of the penalty of life without possibility of parole for the offense of rape is

without merit. It is the position of the respondent that the rationale of *Schick* v. *Reed,* 419 U. S. 256 (1974) is applicable. Although the precise question presented by this case was not considered in *Schick* v. *Reed, supra,* this Court in sustaining the commutation of the death sentence to life without parole stated that:

> "The no-parole condition attached to the commutation of (petitioner's) death sentence is similar to sanctions imposed by legislatures such as mandatory minimum sentences or *statutes otherwise precluding parole;* it does not offend the Constition." (Emphasis ours.) at 419 U. S. 267.

Applying the rationale of *Schick* v. *Reed,* it becomes clear that the penalty of life without the possibility of parole, then in effect in Kentucky at the time the petitioner committed and was convicted for the offense of rape, does not violate the United States Constitution upon the ground that it is cruel and unusual punishment as proscribed by the Eighth Amendment.

Secondly, petitioner's reliance upon this Court's decision in *Coker* v. *Georgia,* 43 U. S. 584 (1977) is clearly misplaced. That case simply is not relevant to the consideration of the issue of the constitutional probity of the penalty of life without benefit of parole upon a conviction of rape. Rather than belabor this point the respondent will direct this Court's attention to its argument with respect to this contention as previously set out in the Jurisdictional Statement.

In conclusion, the respondent respectfully submits that that penalty of life without possibility of parole does not constitute cruel and unusual punishment as proscribed by the United States Constitution.

II.

The Statement Made by the Petitioner to the Police Was Not Obtained in Violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The brunt of Standard's argument with reference to the admission of the statement in issue appears to center around an alleged violation of his right to counsel as protected by the Sixth and Fourteenth Amendments. However, the respondent respectfully submits that the conclusions reached by the lower federal courts were correct and that Standard's right to counsel under the Sixth and Fourteenth Amendments had not been violated.

Standard had been arrested on February 2, 1974. The police took him with them to his home to search it on February 13 after they had acquired a search warrant. It was in the police car on their return from the home to the police station that Standard made the statement now complained of. He was subsequently indicted on 17 separate counts by the Jefferson County Grand Jury on February 18, 1974. As this Court is aware, the right to counsel attaches only at or after that point in time that adversary judicial proceedings have been initiated against the accused, whether by way of formal judgment, preliminary hearing, indictment, information or arraignment. *Kirby* v. *Illinois,* 406 U. S. 682, 689 (1972); *Massiah* v. *United States,* 377 U. S. 201 (1964). Of course, once adversary proceedings have commenced against an individual he has a right to legal representation when the government

interrogates him. For example, in the recent case of *Brewer* v. *Williams,* 430 U. S. 387 (1977) this Court reversed a state criminal conviction finding that the accused had been entitled to the assistance of counsel under the Sixth Amendment at the time he made incriminating statements to police *while being interrogated.* This Court noted that since there had been no interrogation, no constitutional protection under the Sixth Amendment would have come into play. *Brewer* v. *Williams,* 430 U. S., at 400.

In the case *sub judice* there is absolutely nothing in the record whatsoever to indicate that any formal prosecutorial proceedings had been initiated against Standard at the time he gave his statement to the police. Therefore, the constitutional guarantee of right to counsel is not applicable to his case.

Secondly, in *Massiah, Kirby* and *Williams* not only were adversary judicial proceedings initiated, the statements given by the various accused in those cases had actually been elicited from them by either direct interrogation on the part of the authorities (as in *Williams*) or by some surreptitious act by the authorities (as in *Massiah*). Such is not the case here where the accused, during the course of a general conversation not involving the crime in issue, made an unexpected and unelicited comment pertaining to a ski mask rapist. Standard's comments in this regard were not the result either directly or indirectly, of interrogation by the authorities. This beng so, the respondent respectfully submits that Standard has failed to establish any violation of his Sixth and Fourteenth

Amendment protection pertaining to the right of counsel.

Finally, assuming *arguendo* that the statement *Standard* gave to the police was given in violation of either his Fifth or Sixth Amendment rights under the United States Constitution, it is the position of the respondent that the alleged error, if any, is rendered completely harmless and did not entitle Standard to federal habeas corpus relief. *Chapman* v. *California,* 386 U. S. 18 (1967). The alleged prejudicial remark is

> "Well, I'll bet he is scared shitless since you caught me." (TE, 127.)

This statement was even described *by defense counsel* as merely "innocuous" when he referred to it during the trial. (TE, 120.) The respondent submits that there is no vadid basis upon which one may categorize this statement as actually being inculpatory to the petitioner. Finally, Standard took the stand and during the course of his extensive testimony testified as to what he meant when he made that statement. (TE, 283-284.) This explanation would obviously have reduced what little adverse effect, if any, the statement could possibly have had to a complete nullity. In any event, perusal of the transcript of the prosecution's evidence establishes a strong case of guilt, including eye witness testimony, against Standard. Under these circumstances the respondent respectfully submits that even if the introduction of the petitioner's statement into evidence was somehow error, the error is merely

harmless in nature. *Milton* v. *Wainwright,* 407 U. S. 371 (1972); *Chapman* v. *California, supra; Harrington* v. *California,* 395 U. S. 250 (1969).

SUMMARY

For the foregoing reasons, the respondent respectfully submits that the application for petition for writ of certiorari should be denied because a substantial federal question is not presented by either of the two issues raised by the petitioner.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General

PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Counsel for Respondent

PROOF OF SERVICE

I, Patrick B. Kimberlin, III, a member of the bar of the Supreme Court of the United States, hereby certify that three copies of this Brief for Respondent in Opposition have been mailed, first class postage prepaid, this 28 day of Septembr, 1978, to Hon. John Tim McCall, 200 Interchange Building, 835 West Jefferson Street, Louisville, Kentucky 40202, Counsel for Petitioner.

Patrick B. Kimberlin III

PATRICK B. KIMBERLIN, III
Assistant Attorney General